

MEDIATION AND DOMESTIC VIOLENCE TOOLKIT

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1. "*Mediators and mediation programs*"- Excerpt from "Domestic Violence and GALs/CASAs: Legal and Ethical Responsibilities in Child Custody Cases," by Marsha Bradford, JD, Director, Safe and Civil City Program, Office of the Mayor, City of Bloomington
http://bloomington.in.gov/egov/docs/1085759722_477675.pdf

In referring a custody case to mediation, IC 31-17-2.4-1 requires that the court determine "whether mediation is *appropriate* in helping the parties resolve their disputes (*emphasis added*).^[1] Because "domestic violence is estimated to be a factor in at least one-half the cases served at court-based divorce mediation programs" (Pearson, 1997) and because Indiana's family law statutes and ADR Rules are otherwise silent^[2] on the use of mediation in custody cases involving domestic violence, GALs [or judges] *must* look to best practices and Model Code for guidance in assessing: (1) whether referral of parties to mediation *is* appropriate; and (2) if appropriate, whether the mediator and/or program to which the parties are referred are competent; i.e., adequately trained to screen for and address proactively domestic violence issues, including safety issues.

The American Bar Association's Commission on Domestic Violence has published a Policy Report on mediation, the preface of which states: "**The American Bar Association recommends that court-mandated mediation include an opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party.**" The policy report elaborates on the reasons why mediation "*may be inappropriate*, counter-productive and dangerous when one party has perpetrated domestic violence against the other":

First, domestic violence arises under circumstances where an imbalance of power is entrenched in the relationship. Second, perpetrators of domestic

violence may use the legal system to further manipulate and abuse their victims. Third, mediation may endanger victims by placing them in a situation where they have to see their abusers in person and discuss issues that threaten the abuser's sense of control. Though this is relevant to all legal conflicts, it is presented with more frequency in family law cases in which the parties must resolve custody and visitation disputes.

In its conclusion, the policy report asserts that:

Mediation constitutes a court-sanctioned point of contact between abusers and victims. Court mediation programs can do much to increase the likelihood of a safe mediation process that ensures just and equitable outcomes. However, if not carefully structured with safety mechanisms in place mediation can provide abusers with ongoing opportunities for abuse. Safety considerations should be reflected within mediation statutes, court rules, procedures and professional practices. Mediators who intend to undertake these cases must be adequately trained about domestic violence. Ultimately, however, the most critical safety provision within any mediation process is the choice of a victim of domestic violence to opt-out of the process. That choice should be available before a victim enters mediation or anytime during the course of the process. [\[3\]](#)

The Model Code on Domestic and Family Violence states in section 407: A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that domestic or family violence has occurred unless:

- (a) Mediation is requested by the victim of the alleged domestic or family violence;
- (b) Mediation is provided in a specialized manner that protects the safety of the victim by a certified mediator who is trained in domestic and family violence; and
- (c) The victim is permitted to have in attendance at mediation, a supporting person of his or her choice including but not limited to an attorney or advocate.

The National Judicial Curriculum recommends that training include "at a minimum: how to identify and screen for domestic violence; risk assessment and safety planning; whether to mediate where there is a power imbalance between the parties, and if so how to do this; effects of domestic violence

on all family members; availability of local resources (e.g. batterer's programs, advocacy and counseling for battered women, shelters, etc.); applicable state statutes and case law" (p. 124). The NJC also addresses issues of secure facilities, the need for separate sessions in mediation and counseling, problems with requiring battered parties to pay for evaluator fees,^[4] and cultural sensitivity and linguistic accessibility (p. 127-128).

The ABA Center for Children and the Law and the Academy of Family Mediators have developed "Domestic Abuse and Custody Mediation Training for Mediators," an 18-hour curriculum, and "Domestic Abuse and Custody Mediation Training for Judges and Administrators," a three-hour version. Using the Model Code as a starting point, these curricula are premised on the concept that screening for domestic violence in custody and visitation cases should be mandatory, and when violence is found, mediation should not proceed unless the victim of violence requests it.^[5]

^[1] See IC 31-17-2.4-1 Factors in determination [mediation]: Sec. 1. Whenever the court issues an order under this article, other than an ex parte order, the court shall determine whether the proceeding should be referred to mediation. In making this determination, the court shall consider: (1) the ability of the parties to pay for the mediation services; and (2) *whether mediation is appropriate in helping the parties resolve their disputes (emphasis added)*. <http://www.IN.gov/legislative/ic/code/title31/ar17/ch2.4.html>

² However, see IC 34-26-5-15, Prohibition on mediation. Sec.15: A court may not: (1) order parties into mediation; or (2) refer parties to mediation; for resolution of the issues in a petition for an order for protection regarding family or domestic violence. This section may not be construed to preclude mediation in other cases involving the same parties.

³ American Bar Association Commission on Domestic Violence (2000)
http://www.abanet.org/domviol/med_reccomend.html

⁴ See IC 34-10-1-2 and *Sholes v Sholes*, 760 N.E. 2d 156 (Ind. 2001) for the argument that the court may not assess fees from indigent parties for court-ordered participation of evaluators and GALS.

⁵ L Girdner, *Domestic Abuse and Custody Mediation Training for Judges and Administrators: Instructors Guide* (Chicago, IL: American Bar Association, 1999.)

2. "DOMESTIC ABUSE AND CUSTODY MEDIATION TRAINING FOR MEDIATORS" AND "DOMESTIC ABUSE AND CUSTODY MEDIATION TRAINING FOR JUDGES AND ADMINISTRATORS"

<http://www.abanet.org/child/catalog/books.html>

Two new curricula available from the American Bar Association with instructor notes, participant handout materials, & a PowerPoint

presentation. Author: Linda Girdner. "These curricula address court/mediation program screening for domestic violence, appropriateness and types of mediation used when it has occurred, conditional mediation, safely terminating mediation, and more. The curriculum for mediators is an 18-hour program with instructor notes, participant handouts, small group and role play exercises. It is geared to mediators handling custody and visitation disputes. The curriculum for judges and court and program administrators is a 3-hour training for use in overseeing mediation services. It emphasizes best practices, including how to screen for domestic violence, not pressure survivors into mediation, and safely terminate mediation. Both curricula include presentation slides (on included diskette)." 800-285-2221; \$22 & \$18, respectively.

3. "FAMILY VIOLENCE: MEDIATION"

<http://www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=SFVIP>

A free packet providing up-to-date research articles and information on mediation in cases involving family violence. Prepared by the staff of the Resource Center on Domestic Violence: Child Protection and Custody and available from the National Council of Juvenile and Family Court Judges, PO Box 8970, Reno, Nevada 80507, 1-800-527-3223.

4. "Model Code on Domestic and Family Violence"

<http://www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Filename=newmodelcode.pdf>

Developed by the National Council of Juvenile and Family Court Judges. (The Model Code provisions on protection orders were the template for Indiana's new Orders of Protection statute.) Available free: 1-800-527-3223; pages 36 & 37, copied below:

Section 408(A), the Model Code states:

1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect, the court shall not order mediation or refer either party to mediation.
2. In a proceeding concerning the custody or visitation of a child, if there is an allegation of domestic or family violence and an order for protection is not in effect, the court may order mediation or refer either party to mediation only if:
 - a. Mediation is requested by the victim of the alleged domestic or family violence;
 - b. Mediation is provided by a certified mediator who is trained in domestic

and family violence in a specialized manner that protects the safety of the victim; and

c. The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.

For jurisdictions that have developed mandatory mediation by trained, certified mediators, and that follow special procedures to protect a victim of domestic or family violence from intimidation, the Model Code provides Section 408(B) as an alternative:

1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or there is an allegation of domestic or family violence, the court shall not order mediation or refer either party to mediation unless the court finds that:

(a) The mediation is provided by a certified mediator who is trained in the dynamics of domestic and family violence; and

(b) The mediator or mediation service provides procedures to protect the victim from intimidation by the alleged perpetrator in accordance with subsection 2.

2. Procedures to protect the victim must include but are not limited to:

(a) Permission for the victim to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate; and

(b) Any other procedure deemed necessary by the court to protect the victim from intimidation by the alleged perpetrator.

5. "The Impact of Domestic Violence on Your Legal Practice--a Lawyer's Handbook," American Bar Association, Commission on Domestic Violence

Editors: Deborah M. Goelman, Fredrica L. Lehrman, Roberta L. Valente

"Domestic violence is no longer a small subspecialty of family law practice. Experts across the country acknowledge that domestic violence has an impact on many fields of law. To help lawyers who are not aware of the broad effects of domestic violence in their specialties, the Commission has compiled a lawyer's handbook with more than fifty chapters, outlining the relevance of domestic violence in numerous fields, including family, criminal, tax, real property, and tort law, to name just a few subjects covered

in this unique manual. The handbook also addresses the ethical responsibilities of lawyers representing victims, batterers, and children, and provides practical guidelines for identifying domestic violence and conducting safety planning with clients."

Product code # 5480001: \$35.00 + \$5.95 shipping and handling; **To order this publication use the on-line order form--**

<http://www.abanet.org/domviol/pubs.html>--or call the ABA Service Center at 800/285-2221.

The definitive handbook on DV and the practice of law; a must for every law office. Contains a chapter on mediation by Linda K. Girdner (p. 4-17).

6. American Bar Association Commission on Domestic Violence

<http://www.abanet.org/domviol/home.htm>

"The American Bar Association Commission on Domestic Violence website provides valuable information about a wide-range of domestic violence issues and extensive links to other resources and organizations. The website includes listings of ABA policies, training materials, legal briefs, and sample legal forms relevant to domestic violence issues and proceedings. The website also provides information about upcoming events and training opportunities." [!](#)

ABA Policies on Domestic Violence Issues

http://www.abanet.org/domviol/med_reccomend.html

American Bar Association

Commission on Domestic Violence

POLICY 00A109B

Approved by the American Bar Association House of Delegates at the Annual Meeting in July, 2000

Co-Sponsored by

Commission on Domestic Violence

SECTION OF DISPUTE RESOLUTION

SECTION OF FAMILY LAW

STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN

TORTS AND INSURANCE PRACTICE SECTION

YOUNG LAWYERS DIVISION

The American Bar Association recommends that court-mandated mediation include an opt-out

prerogative in any action in which one party has perpetrated domestic violence upon the other party.

REPORT

Mediation is a process through which an impartial third party assists adverse parties to reach a voluntary, mutually agreeable and non-adversarial resolution of their dispute. Mediation has become a well-recognized and useful alternative to the traditional adversarial system as a means of resolving disputes, crossing the spectrum of legal conflicts. Court-mandated mediation has gained popularity in many areas, including the family law context, as a method of resolving child custody and visitation disputes.¹

Even when state statutes or court rules do not mandate mediation, judges frequently refer parties to mediation. A court referral often has the effect of a court order, as the parties may interpret it to mean the judge intends for them to mediate.

Mediation is an appropriate and positive means for many parties to self-determine successful resolution of their legal conflicts. However, it may be inappropriate, counter-productive and dangerous when one party has perpetrated domestic violence against the other. When domestic violence has occurred, mediation may be inappropriate for a number of reasons. First, domestic violence arises under circumstances where an imbalance of power is entrenched in the relationship. Second, perpetrators of domestic violence may use the legal system to further manipulate and abuse their victims. Third, mediation may endanger victims by placing them in a situation where they have to see their abusers in person and discuss issues that threaten the abuser's sense of control. Though this is relevant to all legal conflicts, it is presented with more frequency in family law cases in which the parties must resolve custody and visitation disputes.

This report will discuss this issue in more depth and will justify the policy of opt-out provisions for mandatory court ordered mediation. The report will also outline ways state legislatures and courts can structure mediation programs to better ensure that the concerns of victims of domestic violence are addressed so that mediation may be a safe and viable option for resolution of legal conflicts, including family law cases.

I. BACKGROUND AND DISCUSSION

Domestic violence is a pattern of behavior in which one intimate partner uses physical violence, coercion, threats, intimidation, isolation and emotional, sexual or economic abuse to control and change the behavior of the other partner.² While domestic violence affects people of every age, educational and socioeconomic level, race or ethnicity, sexual orientation, and religion, victims are overwhelmingly female,³ and nearly all abusers

are male.⁴ By conservative estimates, one to four million American women are abused by intimate partners each year.⁵

When victims of domestic violence leave or attempt to leave a relationship, abusers often become increasingly violent. Retaliation for leaving may include heightened physical abuse, threatening or attempting to take custody of the children, abusing, stalking or harassing the victim and children, or abducting the children. This is a phenomenon known as separation violence.⁶ It is often during this separation that one of the parties initiates legal proceedings and mediation may be offered or ordered.

A fundamental principle of mediation is that parties must be able to reach a voluntary, un-coerced agreement. This is often impossible in cases in which one party abuses the other, given the inherent power imbalance between an abuser and victim. When one party exercises power or control over the other party through a current or past history of physical violence, intimidation or other means of control, it is unlikely that either party will bring to the mediation process the requisite spirit of openness, fair play and candor. Contrarily, it is much more likely that a victim will be fearful of openly discussing what is in her best interest and the abuser will maintain a sense of entitlement to control the victim and the issues at hand. Though victims tend to understate the seriousness of their own danger, they are in the best position to assess the danger. Through informed choice, preferably with the assistance of their attorneys, they ultimately are in the best position to know when it is safe and comfortable to undertake mediation. So though mediation programs can be developed with victims' safety in mind and in an endeavor to even the playing field, opt-out provisions are still critical. Undertaking a mandated mediation process may serve to prolong the abuser's ability to harass, control and maintain contact with the victim. Mediation simply becomes the avenue the abuser takes to draw out the process.

Abusers with no intention of reaching a mediated resolution may pressure or coerce victims into entering mediation simply to extend contact, and may intend at the outset, to aggressively pursue litigation after mediation "fails." One usual example of this involves contested custody actions after victims separate from abusers. Many abusers find that threatening to harm or take the children is an effective way to control victims.⁷ Victims may be terrified to send their children, unsupervised, to visit an abuser out of fear for the children's safety. Additionally, abusers may move the courts for permanent sole or joint custody. In fact, research has shown that fathers who batter mothers are twice as likely to seek sole physical custody of their children

than are non-violent fathers.⁸ Thus, the abuser accomplishes the goal of maintaining contact with and control over the victim. Mediation is not appropriate in cases in which one party is using the system to manipulate the other party. Victims of domestic violence are in the best place to understand whether an abuser's desire to mediate encompasses this motive. Opt-out provisions ensure that this damaging and dangerous motive does not further victimize the abused parent or the children.

Mediation programs that are not carefully structured can endanger the victim's physical safety. These issues undoubtedly arise with the most frequency in family law matters. Discussions that take place during family law mediation sessions naturally have to do with issues of separation and the continued relationship of the parents with their children. These discussions have the potential to provoke an abuser who constantly seeks to maintain control over the victim. It is unlikely that an abused spouse could be forthright in discussing issues like the necessity of the children's supervised visitation with the abuser without provoking anger and compromising safety. Victims are the best able to judge in what setting such issues may be safely addressed. Therefore, they should be provided with the ability to opt-out of mediation prior to entering the process or at any stage of the process if they feel it is not safe for them.

Abused parties are in the best position to assess their safety and to know whether mediation is a viable option for them. Court mediation programs can and should devise programs that consider domestic violence. Much can be done to provide for assurances of safety and enhance the likelihood of just and equitable outcomes. Court personnel, attorneys and mediators should be trained about domestic violence. Before discussing mediation as a method of conflict resolution, attorneys, courts, and mediators should screen for domestic violence. The screening should be undertaken when the parties are not together and when candor is encouraged. Program policies should allow the mediation process to be stopped if the abused party believes her safety is jeopardized or if the abuser is using the process for dubious motives. The mediation location should be safe. Escort to and from the mediation location should be arranged for the abused party if she feels it is necessary. The abused party should be allowed a support person in all mediation sessions, whether that be her attorney or another supportive individual. Rules of conduct for the mediation process should be firmly established and adhered to. These rules should include no name-calling, no threats of violence, no intimidating behavior. And last, but foremost, an abused party should

be able to opt-out before the process begins or anytime during the course of the process. If the results of the screening indicate domestic violence is or has been an issue, appropriate referrals to community resource should be provided the victim.

II. EXAMPLES OF MODEL STANDARDS AND STATE LEGISLATION

Because the victim is most qualified to weigh the risks to her safety and the likelihood of a fair and un-coerced outcome, mediation mandates should at the threshold include opt-out provisions for victims of domestic violence.

Legislatures and courts can go even further, however, to protect victims of domestic violence by enacting laws and court rules which require courts to conduct domestic violence screening, require appropriate mediator training, and assess the likelihood of a truly mediated resolution before ordering or referring parties to child custody mediation. If these safety measures are in effect, victims of domestic violence may be more likely to choose mediation rather than choosing to opt-out. However, the opt-out provision should always be a part of court-mandated mediation programs, even when other safety measures are in place. Several efforts to address this problem already exist.

A consortium of state and national family mediation organizations, including the ABA Family Law Section Committee on Mediation, is currently developing Model Standards of Practice for Family and Divorce Mediators. Standard XI of the August 1999 draft states that "a family mediator should recognize a family situation involving domestic violence and take appropriate steps to shape the mediation process accordingly." Standard XI further states that:

(B) mediators shall be knowledgeable about dynamics of domestic violence, applicable laws and attend trainings; should not undertake a mediation which involves domestic violence without adequate training;

(C) should make effort to screen for domestic violence before entering mediation agreement with parties; alert to possible need for continuing screening throughout mediation process;

(D) where domestic violence may be an issue, consider safety measures for parties and mediator;

D.[sic] understand impact of domestic violence on kids and make appropriate referrals for kids and parents;

(E) ensure that victims consider risks to physical safety & psychological well-being of selves and kids when agreeing to a parenting plan.

In 1994, the National Council of Juvenile and Family Court Judges issued the Model Code on Domestic and Family Violence, which contains provisions pertinent to mediation and domestic violence. In Section 408(A), the Model Code states:

1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect, the court shall not order mediation or refer either party to mediation.

2. In a proceeding concerning the custody or visitation of a child, if there is an allegation of domestic or family violence and an order for protection is not in effect, the court may order mediation or refer either party to mediation only if:

- a. Mediation is requested by the victim of the alleged domestic or family violence;
- b. Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and
- c. The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.

For jurisdictions that have developed mandatory mediation by trained, certified mediators, and that follow special procedures to protect a victim of domestic or family violence from intimidation, the Model Code provides Section 408(B) as an alternative:

1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or there is an allegation of domestic or family violence, the court shall not order mediation or refer either party to mediation unless the court finds that:

- (a) The mediation is provided by a certified mediator who is trained in the dynamics of domestic and family violence; and
- (b) The mediator or mediation service provides procedures to protect the victim from intimidation by the alleged perpetrator in accordance with subsection 2.

2. Procedures to protect the victim must include but are not limited to:

- (a) Permission for the victim to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or

advocate; and

(b) Any other procedure deemed necessary by the court to protect the victim from intimidation by the alleged perpetrator.

State legislatures have recognized these issues as well. For example, in Pennsylvania, courts are prohibited from ordering mediation in any divorce or child custody case in which domestic violence or child abuse has occurred during the pendency of the case or during the twenty-four months preceding the filing of the action.⁹ Similarly, Texas has enacted laws to protect victims of domestic violence from

undertaking an inappropriate family law mediation process.¹⁰

II. CONCLUSION

Mediation constitutes a court-sanctioned point of contact between abusers and victims. Court mediation programs can do much to increase the likelihood of a safe mediation process that ensures just and equitable outcomes.

However, if not carefully structured with safety mechanisms in place, mediation can provide abusers with ongoing opportunities for abuse. Safety considerations should be reflected within mediation statutes, court rules, procedures and professional practices. Mediators who intend to undertake these cases must be adequately trained about domestic violence. Ultimately, however, the most critical safety provision within any mediation process is the choice of a victim of domestic violence to opt-out of the process. That choice should be available before a victim enters mediation or anytime during the course of the process.

The American Bar Association should encourage states and courts to design their laws and policies to include opt-out prerogatives to court-mandated mediation in any action in which one party has perpetrated domestic violence upon the other party.

Accordingly, we urge adoption of the enclosed resolution.

Respectfully submitted,

Judy Perry Martinez

Chair, Commission on Domestic Violence

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